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In The

Supreme Court of the United States

October Term, 1994

TERA HARPER, JEFFREY TOM, *and* ALLAN ANDUHA, *in their capacities as Chairperson and Members of the Adjustment Committee, Halawa Correctional Facility, Hawaii Department of Public Safety,*

Petitioners,

vs.

SABIL M. MUJAHID, *aka* Terry Smith,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules create certain procedures and require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

2. If state prison rules create a "liberty interest" in avoiding disciplinary segregation, whether, after a duly noticed hearing, where the inmate was present, are disciplinary committee findings of rule violations, supported by written determinations that the committee relied on "written reports and testimonies presented at the hearing," sufficient to meet the mandates of the Constitution's Due Process Clause?

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vs.

SABIL M. MUJAHID, *aka* Terry Smith,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Tera Harper, Jeffrey Tom, and Allan Anduha, in their official capacities as Chairperson and Members of the Adjustment Committee, Halawa Correctional Facility, Department of Public Safety, State of Hawaii, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding February 1, 1994. This Petition is related to *Sandin v. Conner*, No. 93-1911 (U.S. Pet. for Cert. filed May 26, 1994).

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit entered February 1, 1994, is unreported and is reprinted in Appendix ("App.") "B" to this Petition. The order of the Court of Appeals, filed April 5, 1994, denying Petitioners' petition for rehearing is printed in App. "E." The February 1, 1994, order of the Court of Appeals withdrawing its July 1, 1993, memorandum disposition and granting the Petitioners' previous petition for rehearing is reprinted in App. "A." The Court of Appeals' July 1, 1993, withdrawn memorandum disposition is reprinted in App. "C." The August 20, 1992, order of the District Court from which appeal was taken by Respondent Mujahid is unreported and is printed in App. "D."

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was entered July 1, 1993, *see* App. "C," and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* were filed July 15, 1993. On February 1, 1994, the Ninth Circuit granted the petition for rehearing, withdrew its memorandum disposition, and filed a new memorandum disposition. *See* App. "A" and "B." A timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed with respect to the new memorandum disposition on February 14, 1994, and was denied on April 5, 1994. *See* App. "E." The time in which this Petition may be filed therefore extends to and

includes July 5, 1994 (July 4, 1994 being a federal legal holiday within the meaning of Sup. Ct. R. 30.1 and 5 U.S.C. § 6103), and this Petition is timely. Jurisdiction is invoked here under 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. § 1343(3). Jurisdiction to review the final judgment entered in the District Court in favor of all Defendants lay in the United States Court of Appeals pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part that

> [No State shall] deprive any person of life, liberty, or property, without due process of law.

Subchapter 2, Title 17, of the Hawaii Administrative Rules, which governed the adjustment process at Halawa Correctional Facility at all times relevant to this litigation, has been reprinted in its entirety in App. "F," *infra* Pet. App. A33 *et seq.*

STATEMENT OF THE CASE

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), this Court held that a prison's rules that

permitted, but did not mandate, denial of visitation privileges under certain circumstances did not create a "liberty interest" in receiving visitors. *Id.* at 464. In response to the request of thirty-one States' Attorneys General, the Court found it was unnecessary to create a "bright line" rule "that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Id.* at 461 n.3. "Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," "express[ing] no view on the proposal and leav[ing] its resolution for another day." *Id.* at 462 n.3.

This case concerns not the due process implications of visitation with those *outside* the prison, who are presumed to be innocent, but the ability of prison officials to segregate inmates within the prison for violation of disciplinary rules. In this context, where the need to be free of intrusive federal review is at its height, the Ninth Circuit has held that Hawaii prison rules create a "liberty interest" in avoiding "disciplinary segregation" without more. Hawaii does not grant "good time" credits, and even the most serious disciplinary finding has no necessary impact upon parole. The main issue in this case is whether Hawaii's prison rules, which authorize, but do not require, the imposition of disciplinary segregation, create a federally protected "liberty interest" solely because those rules require, as a matter of state law, "substantial evidence" of misconduct before an official exercises the

discretion to order, or not order, an inmate to a period of segregation.

A second issue is whether, in a case where an inmate has admitted to facts sufficient to prove a rule violation, it violates Due Process for a disciplinary committee, after a duly noticed hearing at which the inmate was present and allowed to present evidence, to sustain the charges against the inmate in written findings that stated the committee "based their decision on written reports and testimonies presented at the hearing."

1. Inmate Sabil M. Mujahid, also known as Terry Smith, was convicted by a Hawaii jury of attempted murder and at all relevant times has been housed in Hawaii's maximum security prison, Halawa Correctional Facility. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities," including "[i]ndividuals committed because of serious predatory or violent crimes against the person"; "intractable recidivists"; "[p]ersons characterized by varying degrees of personality disorders"; "[r]ecidivists identified with organized crime"; and "[v]iolent and dangerously deviant persons." Haw. Rev. Stat. § 353-7(b)(1) (1985 & Supp. 1992). At the times relevant here, Halawa facility inmates were governed by a disciplinary system that consisted of Hawaii's general criminal laws and an "adjustment process" administered by the prison itself. *See* App. "F," *infra*.

2. Under the "adjustment process," prison administrators have defined a variety of "prohibited acts," categorizing them as to their severity. "Misconduct" is

categorized as "greatest misconduct," "high misconduct,", "moderate misconduct," "low moderate misconduct," and "minor misconduct." Pet. App. A35-A44. The maximum punishment for the most serious "misconduct" is "[d]isciplinary segregation up to sixty days," or "[a]ny other sanction other than disciplinary segregation." Haw. Admin. R. § 17-201-6(b), Pet. App. A37. The "other sanctions" to which the administrative rule refers includes loss of privileges, such as access to non-legal mail or the commissary, but do not include any sanction that lengthens the inmate's term of incarceration. Hawaii does not employ any system of "good time" credits, and the Hawaii State Paroling Authority is free to ignore a record of misconduct in granting parole. *See* Haw. Rev. Stat. §§ 353-68, 353-69 (1985). Parole may be granted "at any time after the prisoner has served the minimum term of imprisonment fixed according to law," *id.* § 353-68, and so long as "it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society," *id.* at 353-69. In the event an inmate is accused of a "serious rule violation," *see* Pet. App. A44, the prison convenes an "adjustment committee," which, in relevant respect, is required to make "[a] finding of guilt," only "where: (1) The inmate or ward admits the violation or pleads guilty" or "(2) the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b), Pet. App. A49-A50. After a finding of guilt, "[t]he adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation," *id.* § 17-201-19, Pet.

App. A50. The committee need not impose any sanctions upon the prisoner.

3. On December 28, 1990, while housed at Halawa, Mujahid attempted to send a letter containing unused postage stamps to his brother in Kansas City. *See* App. "G." The outside of the letter stated in prominent language, "5 stamps enclosed," and a guard in the mailroom believed that Mujahid had "received those stamps from another inmate," *id.*, indicating unlawful commerce within the prison. An investigation was ordered and, on February 8, 1991, a second Adult Correctional Officer investigated the charges against Smith, and determined that there was probable cause to believe that Smith had violated two State of Hawaii Administrative Rules which in turn prohibited:

> (10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.
>
> * * *
>
> (31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family, or friend.

Pet. App. A39, A41. Mujahid admits that a hearing was held, and at the hearing he stated that, he "acquired the stamps in a package sent to him by the Lt. Governor Office where Plaintiff was in the process of having hi[s] name change[d] with the assistance of his brother Frank K. Smith, who sent the filing fees and all necessary postage stamps to the Lt. Governor['s] office to complete the full process for Plaintiff." Clerk's Record 41 at 2. This

statement admitted all the facts relevant to the case, in that Plaintiff admitted that he received the stamps from his brother, at a minimum, indirectly through the offices of the Lieutenant Governor, and there was no genuine claim below that receipt of stamps either from the office of the Lieutenant Governor or Frank Smith constituted "institutional channels." The Adjustment Committee, with Petitioners as Chairperson and Members, found Mujahid guilty of both alleged rule violations, but imposed no additional punishment, finding that the "time served" in administrative segregation pending disposition of the matter was sufficient. *See* App. "G." In the part of the committee's disposition marked, "evidence relied upon for decision," the adjustment committee stated that they "based their decision on written reports and testimonies presented at the hearing." *See* App. "G".

4. The District Court, on review of a Magistrate-Judge's recommendation to grant summary judgment on the merits for defendants, held that Mujahid did have a liberty interest in avoiding disciplinary segregation, but nonetheless held that "the adjustment committee's written report did not need any further specificity." Pet. App. A27. Chief Judge Kay reasoned as follows:

> In assessing the alleged violation of Rule § 17-201-8(a)(31), under the evidence presented, there were three possible scenarios that the adjustment committee could find: Plaintiff either received the stamps from (1) his brother; (2) another inmate; or (3) the Lieutenant Governor's Office. It can be easily inferred from the committee's finding of a violation of Rule § 17-201-8(a)(31) that it did not believe Plaintiff had received the stamps from the Lieutenant

Governor's Office. If the committee had believed that story, this rule would not have been implicated at all. Therefore, the committee must have believed either that Plaintiff received the stamps from his brother, or that he received them from another inmate. Next, because the adjustment committee appears to have interpreted Inmate Handbook Rule § 17-201-8(a)(31) (see *supra* at 2) as prohibiting inmates receiving anything of value from *any* inmate's family member (including the inmate's own family) the committee would have found that Plaintiff violated the rules regardless of which scenario it believed. Therefore, the adjustment committee's written report did not need any further specificity to support its findings that the Plaintiff received the stamps either from another inmate or from his brother, not from the Lieutenant Governor's Office.

Additionally, the adjustment committee found that Plaintiff had violated Rule 17-201-8(1), which prohibits inmates from possessing anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels. By Plaintiff's own pleadings, he admits that he obtained the stamps either from his brother or through the office of the Lieutenant Governor. The Defendants, in their moving papers, establish that neither of these sources constitute "institutional channels." Accordingly, there is no dispute that Plaintiff did in fact violate Rule 17-201-8(10). Therefore, the report need not specify with any more detail why Plaintiff was found to have violated this Rule. There was no alternative finding the committee could have made – whether it believed Plaintiff

> or the ACO [Adult Correctional Officer], Plaintiff was guilty of violating this rule. Even if the finding of a violation of Rule 17-201-8(a)(31) was not specific enough, this finding alone would support Plaintiff's confinement in administrative segregation.

Pet. App. A26-A28. *See also id.* A27 n.1 (sending stamps *to* family member independently violates rules).

5. On appeal, the Ninth Circuit, following the reasoning of its published opinion in *Conner v. Sakai,* 994 F.2d 1408 (9th Cir. June 2, 1993), *superseded,* 15 F.3d 1463 (9th Cir. Feb. 2, 1994), *pet. for cert. filed,* No. 93-1911 (U.S. May 26, 1994), held that Mujahid enjoyed a liberty interest in avoiding placement into disciplinary segregation. Although Mujahid was never actually given further time in segregation as a result of the charges at issue here, the Court reasoned, as in *Conner,* that the Hawaii rule that mandates "freedom from disciplinary segregation" if "the inmate does not admit guilt," and "the committee does not find substantial evidence," to provide the " 'explicitly mandatory language' necessary to create a protected liberty interest." Pet. App. A7. Having found that Mujahid possessed a liberty interest, the Court found that the adjustment committee's statement of "evidence relied upon for decision" was constitutionally inadequate under *Wolff v. McDonnell,* 418 U.S. 539 (1974), because it "provides Mujahid no insight into the basis for the Committee's finding of guilt." Pet. App. A7. Although the Court initially stripped Defendants in their individual capacities of qualified immunity from suit for damages, *id.* A18, it granted rehearing and upheld the summary judgment granted below to the extent it eliminated the Plaintiff's

claims for damages. *Id.* at A8-A10. Although the Court invited a second petition for rehearing as to the issues of equitable relief, it ultimately stood upon its Due Process analysis, and denied rehearing and *en banc* review. *Id.* at A32.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel's decision in this case overturning summary judgment as it pertains to Mujahid's challenge to the 1991 misconduct hearing threatens an undue – and unprecedented – expansion of federal judicial review of prison management decisions. In the circumstances of this case, the exacting federal review directed by the Ninth Circuit does not – and cannot – serve to restore "good time" credits, or compel, or even necessarily affect, parole. Such review does not rid Hawaii's prisons of unsafe environmental conditions, or deter violence against inmates, either from errant correctional officers, or from other inmates; nor does it serve to protect the important but limited First Amendment rights inmates enjoy despite their incarcerated status. Nor does it even protect state inmates from irrational and arbitrary assignments to disciplinary segregation. After all, even without procedural Due Process protections, inmates would be entitled under the Equal Protection Clause to treatment that meets minimum rationality.

Instead, without reason or precedent to back it, the Ninth Circuit has simply made *every* disciplinary proceeding a basis for intrusive federal review, regardless of the limited effect of the discipline measures at issue.

Moreover, the Ninth Circuit, in disregard of all settled Due Process jurisprudence, has imposed the most exacting standards on prison disciplinary decisions, requiring detailed written factfinding where this Court has only required a simple statement of "the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). Review should be granted because, as to both questions presented, the judgment below conflicts with this Court's precedents, creates conflicts among the courts of appeals, and presents recurring issues of nationwide importance concerning the administration of prisons.

I. This Court Should Grant Review, Because the Ninth Circuit's Reading of the Requirements for a State-Created "Liberty Interest" in the Prison Setting Is in Direct Conflict with This Court's Precedents and With Decisions of Other Courts of Appeals; In any Case, the Issue at a Minimum is an Unresolved Issue of Nationwide Importance and Should Be Settled Now.

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court determined that prison regulations that authorized administrators to deny visitation privileges in particular circumstances failed to establish a "liberty interest" because "[t]hey stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Id.* at 464. Thus, the Court reasoned, although "[v]isitors *may* be excluded if they fall within one of the described categories," "they need not be." *Id.* Here, as in *Thompson*, inmates found by "substantial evidence" to have committed disciplinary

infractions "may be" assigned to segregation for a period of time, but they "need not be." In as much as this Court has held that the mere expectation of receiving certain procedures does not create a liberty interest, *see Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), this, without more ought to have compelled the Ninth Circuit to affirm. Instead, the Ninth Circuit followed the reasoning of the *dissent* in *Thompson*, *see* 490 U.S. at 475 (Marshall, J., joined by Brennan, and Stevens, JJ., dissenting).

As this Court has stated in a related context, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Indeed, courts of appeals to have addressed issues of this nature have dutifully followed *Thompson's* reasoning.

The decision below, for example, directly conflicts with the Eighth Circuit's analysis in *Burgin v. Nix*, 899 F.2d 733 (8th Cir. 1990). There, the regulations at issue effectively stated that the prison officials must find an inmate to be incorrigible before he may be given a sack lunch instead of the usual tray lunch. Applying *Thompson*, the Court held that the regulations did not create a liberty interest in being served tray lunches because the regulations did not mandate that prison officials serve sacked lunches to inmates found to be incorrigible. 899 F.2d at 735. Likewise, the Ninth Circuit's ruling conflicts with the Seventh Circuit's analysis in *Woods v. Thieret*, 903 F.2d 1080 (7th Cir. 1990) (per curiam). There, while prison rules "mandate[d] *who* shall make the determinations and *what* shall be considered," including

"three substantive predicates," "they do not mandate any particular outcome with regard to the substantive predicates." *Id.* at 1083. Because a decision to place an inmate on "lockdown" was not mandated by the prison rules for any specific situation, the rules did not create a liberty interest. *Id.* The Ninth Circuit's analysis in this case thus not only conflicts with this Court's own holding in *Thompson*, but at least two circuits' construction of that holding.

Review should be granted, in that, at a minimum, federal judicial recognition of "liberty interests" as stemming from state by prison disciplinary schemes that do not affect "good time" credits and that do not necessarily impact on parole considerations raises unsettled issues of nationwide import that the Court should review. Indeed, nowhere could this be more true than in this case, where the inmate was not ordered to serve *any* additional time in segregation. Nor, for that matter, did the inmate suffer a loss of privileges, over and above those incident to the administrative confinement itself. There is no dispute in this case that the requisites for administrative confinement were met, *see Hewitt v. Helms*, 459 U.S. 460 (1982), and, so far as prospective equitable relief is concerned, Respondent has advanced nothing more than a claim for libel *simpliciter*. Mujahid has not "asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1793, 1794 (1991) (discussing, *inter alia*, *Paul v. Davis*, 424 U.S. 693 (1976)).

In the specific context of prison administration, this Court, in *Thompson* itself, was able to avoid a substantial claim, presented both by the Petitioner in that case, and more than thirty States' Attorneys General, *see* 490 U.S. at

455 n.*, urging the Court "to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " 490 U.S. at 461 n.3. The court "express[ed] no view on the proposal and le[ft] its resolution for another day." *Id.* at 462 n.3. The decision below calls upon this Court to decide this issue, which is of vast importance to all of the States, as well as the United States.

The Ninth Circuit's decision to extend due process protection to any prison disciplinary proceeding that threatens to impose disciplinary segregation is not tied to any principle that this Court has espoused in its Due Process jurisprudence.

In the leading case in this area, *Wolff v. McDonnell*, 418 U.S. 539 (1974), for example, Nebraska had created a scheme for the forfeiture of good-time credits, without providing due process protections. The Court subjected the scheme to analysis of "the process due," after determining that, because "the State ha[s] created the right to good time and itself recogniz[ed] that its deprivation is a sanction authorized for major misconduct," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. As the Court would later hold in *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) "[a]s long as the conditions or degree of confinement to which

the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." The Court has also emphasized "that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Hewitt v. Helms*, 459 U.S. 460, 470 (1983). In *Hewitt*, the Court did state that a liberty interest had been created by Pennsylvania's procedures for administrative detention. But the Court found that no Due Process violation had been shown. *See* 459 U.S. at 472-78. *Hewitt's* statements that the State had "created a protected liberty interest" are ultimately *dicta*, and "[i]t is the holdings of [the Court's] cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Insurance Co.*, 62 U.S.L.W. 4313, 4315 (U.S. May 15, 1994) (Scalia, J., for a unanimous Court). It is doubtless for just this reason that the "bright-line" rule proposed, and deferred, in *Thompson* remains a pressing question on which this Court has "express[ed] no view," and left "for another day." 490 U.S. at 462. In light of the panel's decision for the court below, that day, at a minimum, has come. The writ should be granted.

II. Review Should Be Granted to Correct the Ninth Circuit's Exacting Written Factfinding Requirements for Prison Disciplinary Committee Decisions.

Although this Court, in the context of denying prison disciplinary committee members judicial immunity, has

held that "the discipline committee's function" is not "a 'classic' adjudicatory one," and disciplinary members "are not professional hearing officers," *Cleavinger v. Saxner*, 474 U.S. 193, 203 (1985), the Ninth Circuit's ruling in this case imposes detailed factfinding requirements upon state prison disciplinary committees on a par with, or more burdensome than, those imposed on Article III judges themselves. The decision below strikes the disciplinary order in this case, which – after a duly noticed hearing at which the inmate was present, confessed to unlawful acts, and was able to review the reports and evidence presented – specified that the disciplinary committee based its decision "on written reports and testimonies presented at the hearing." As the District Court's analysis makes clear, on the entire record Mujahid was notified, in writing of "the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). The decision below, on this front, simply distorts *Wolff* and sets the Ninth Circuit in sharp conflict with related rulings of other courts of appeals.

As this court recognized in *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), "[p]rocess is not an end in itself," and the requirement of written notice of "the evidence relied upon and the reasons for the disciplinary action taken," as set forth in *Wolff*, must be seen in context. Such a requirement exists to facilitate judicial review, and in general, like all Due Process requirements, to "serve the purpose of making an individual feel that the government has dealt with him fairly." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1985). The failure to include a *Wolff* statement in

a disciplinary order subject to Due Process constraints leaves the inmate, and reviewing courts, at sea in determining whether the disciplinary committee relied on evidence presented at the hearing, or on *ex parte* communications or other improper factors, in reaching its decision. By contrast, in this case, the prison committee's decision pointed both reviewing courts and the inmate to the "evidence relied upon." All of the evidence that was "relied upon" was presented to the inmate, and, based on the committee's decision, Mujahid was able to challenge the final order for sufficiency of the evidence under the standards of *Superintendent v. Hill*, 472 U.S. 445 (1985). Here, as filings in the District Court revealed, Mujahid also confessed to all relevant conduct, admitting the record included " 'the most probative and damaging evidence that can be admitted against him,' " *Arizona v. Fulminante*, 111 S. Ct. 1246, 1255 (1991). In this case, as in *Codd v. Velger*, 429 U.S. 625 (1977) (per curiam), "Respondent has therefore made out no claim under the Fourteenth Amendment that he was harmed" by the denial of more specific findings than those provided. *Id.* at 628-29.

Indeed, permitting the decision below to stand would wreak havoc on Due Process analysis. As Chief Judge Kay found, and as the panel below did not dispute, there were no material issues of fact before the adjustment committee. Federal District Courts themselves are not required to issue findings of fact when rendering summary judgments, *see* Fed. R. Civ. P. 52(a), undoubtedly because further review of such judgments can be accomplished without such findings. Just as the District Court was able to determine whether what Mujahid admitted to was in fact chargeable under the Rules, the

Ninth Circuit ought to have held that Due Process requirements were obeyed here.

The panel's decision in this case is in conflict not only with this Court's Due Process jurisprudence, but also with the Eighth Circuit's opinion in *Brown v. Frey*, 806 F.2d 1407 (8th Cir. 1986), which upheld reliance on a brief statement indicating the prison committee relied on the conduct violation report and the prison rules. As the Eighth Circuit reasoned:

> The purpose of a written statement is not to reconstruct in a technical or detailed fashion the incident, as the board concluded it happened, that led to the disciplinary action. Instead, the purpose of the written statement is to require that the disciplinary board make reference to the evidence it relied on and the reasons for the disciplinary action. This forces the disciplinary board to commit itself, contemporaneously with its decision, to certain evidence and reasons, and thus guarantees that the inmate is not placed at a "severe disadvantage" by being forced to explain the incident or seek redress from unconstitutional acts based on a board's explanation that it patched together after the inmate has forwarded its claim. In this respect, the distinction between a written statement that incorporates statements in a report by reference and one that repeats statements from the report is inconsequential. In both cases, the board has committed itself to certain evidence, and a review based on established facts is available.

807 F.2d at 1414 (citation omitted). Here, the Halawa facility committee "committed itself to certain evidence," namely the "written reports and testimonies presented at

the hearing," meeting all relevant Due Process criteria. *Cf. Redding v. Fairman*, 717 F.2d 1105 (7th Cir. 1983) (striking down adjustment committee statements that advert to nothing more than to " 'all available evidence,' " including evidence that may have been communicated *ex parte*).

CONCLUSION

For the reasons above, certiorari should be granted.

Dated: Honolulu, Hawaii, July 5, 1994.

Respectfully submitted,

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SABIL M. MUJAHID, aka Terry Smith, Plaintiff-Appellant, v. TERA HARPER, Chairman, JEFFREY TOM, Chairperson; ALLEN ANDUHA, Lt., Chairperson, Defendants/Appellees.	NO. 92-16588 D.C. No. CV-91-00215-ACK ORDER (Filed Feb. 1, 1994)

Before: CANBY, FERNANDEZ, and T.G. NELSON, Circuit Judges.

The court has determined that the appellee's petition for rehearing is well taken.

Therefore, it is hereby ordered:

(1) Appellee's petition for rehearing, which was filed July 15, 1993, is granted and the memorandum disposition filed July 1, 1993 is hereby withdrawn.

(2) The Clerk is directed to file the memorandum disposition contemporaneously with the filing of this order.

(3) Appellee's suggestion for rehearing en banc is rejected without prejudice to its renewal after the filing of the memorandum disposition.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SABIL M. MUJAHID, aka Terry Smith, Plaintiff-Appellant, v. TERA HARPER, Chairman, JEFFREY TOM, Chairperson; ALLEN ANDUHA, Lt., Chairperson, Defendants/Appellees.	NO. 92-16588 D.C. No. CV-91-00215-ACK MEMORANDUM* (Filed Feb. 1, 1994)

Appeal from the United States District Court for the District of Hawaii Alan C. Kay, District Judge, Presiding

Submitted June 21, 1993**
Filed July 15, 1993
Withdrawn February 1, 1994

Before: CANBY, FERNANDEZ, and T.G. NELSON, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Mujahid's request for oral argument.

Sabil M. Mujahid, a.k.a. Terry Smith, a Hawaii state prisoner, appeals the district court's summary judgment in favor of prison officials in Mujahid's 42 U.S.C. § 1983 action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). We affirm and remand.

I
Background

Prison officials at the Halawa Correctional Facility charged Mujahid with violating two prison rules after Mujahid was found in possession of five postage stamps, which were enclosed in a letter Mujahid addressed to his brother, Frank Smith. The first rule prohibits "[p]ossession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate . . . through regular institution channels." *State of Hawaii, Dep't of Social Servs. and Housing, Title 17, Admin. R. of the Corrections Div.*, Rule 17-201-8(a)(10). The second prohibits "[g]iving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of inmate's or ward's family, or friend." Hawaii Admin. Rule § 17-201-8(a) (31).

The prison Adjustment Committee notified Mujahid that it would conduct a hearing on the charges. Mujahid appeared at the hearing and testified that he received five postage stamps from his brother through the Lieutenant Governor's office in connection with his petition to

change his name.[1] The Committee found Mujahid guilty of both charges and sentenced Mujahid to fourteen days of disciplinary segregation under Hawaii Admin. Rule § 17-201-19. The Committee stated that it based its decision "on written reports and testimonies presented at the hearing."

Mujahid filed a complaint alleging the Committee violated his due process rights because it failed to provide an adequate statement of reasons for its decision and because there was insufficient evidence to find him guilty of violating prison rules.[2] Mujahid sought compensatory and punitive damages and injunctive relief.

The prison officials' summary judgment motion was referred to a magistrate judge, who found that although the Committee's "bare-bones summations" were "deficient" and "lacking in specificity," the Committee's failure to provide a more specific summary did not violate Mujahid's due process rights because the charges against

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[1] It is unclear from the record what other evidence was presented to the Committee. The record includes a copy of the misconduct report, in which Officer Reynold Tenn stated that he believed Mujahid may have received the stamps from another inmate and Officer Clayton Smith stated that he believed there was probable cause to believe that misconduct had occurred.

[2] In his complaint, Mujahid also alleged the disciplinary segregation violated his first and eighth amendment rights. Mujahid, represented by counsel, has failed to raise these issues on appeal. Accordingly, we need not address them. *See Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990) (any claim not raised in the opening brief is deemed waived).

Mujahid were not so complicated and the evidence presented not so voluminous or complex as to make it difficult to determine which witnesses the Committee found credible or what evidence it relied upon. The magistrate judge found that Mujahid's testimony, even if believed, did not excuse the violation of the rules.

The district court granted summary judgment, holding that although Mujahid's due process rights were implicated, there was some evidence supporting the Committee's decision and the Committee's statement of reasons was adequate.

II
Analysis

Mujahid contends the district court erred by granting summary judgment because prison officials violated his due process rights because they failed to provide an adequate statement of reasons for their decision, and the evidence offered at his disciplinary hearing was insufficient to support a finding of guilt.[3]

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[3] Mujahid also argues, for the first time on appeal, that the rules under which he was convicted are unconstitutionally vague. Generally, we decline to consider issues not raised before the district court absent extraordinary circumstances. *Pacific Express Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir.), *cert. denied*, 113 S. Ct. 814 (1992). Mujahid contends that he raised this argument below when he argued that prison officials misinterpreted the Rule 17-201-18(31). We disagree with the attempted characterization. Mujahid argued to the district court that the prison officials misinterpreted the prison rules and that he was innocent of the offense charged, not that he was unable to conform his conduct because the rules were vague. Because

A plaintiff may bring an action for civil rights violations under 42 U.S.C. § 1983 by demonstrating that defendants, acting under color of state law, deprived plaintiff of a right guaranteed under the constitution or federal statute. 42 U.S.C. § 1983; *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988).

A liberty interest protected by the fourteenth amendment may arise either from the due process clause itself or from the laws of the states. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). If a state requires certain procedures before an inmate may be placed in disciplinary segregation, then a liberty interest may be created. *See Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983).[4] A state creates a protected liberty interest "by placing substantive limits on official discretion." *Thompson*, 490 U.S. at 4623. "The use of the word, shall, [in connection with specific substantive predicates for action] constitutes the mandatory language needed to create a liberty interest." *Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

Hawaii prison rules provide that an "inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set fourth the evidence relied upon and the reasons for the action taken." Hawaii Admin. R.

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we find no exceptional circumstances, we decline to consider Mujahid's argument. *See id.*

[4] In *Hewitt*, the court found a liberty interest where inmate was placed in administrative segregation. 459 U.S. at 471-72. *Cf. Olim v. Wakinekona*, 461 U.S. 238, 250 (1987) (no liberty interest where inmate was transferred).

§ 17-201-18(c). The rules also provide that "[a] finding of guilt shall be made where: . . . (2) the charge is supported by substantial evidence." Hawaii Admin. R. § 17-201-18(b) (2). Thus, Hawaii's rules contain the "explicitly mandatory language" necessary to create a protected liberty interest. *See Hewitt*, 459 U.S. at 471-72.

Due process requires, at a minimum, that inmates facing disciplinary sanctions be provided "advance written notice of the claimed violation and a written statement of . . . the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). *Accord Redding v. Fairman*, 717 F.2d 1105, 1116 (7th Cir. 1983) (integrity of a prison disciplinary committee's decision "can be insured only if [it enunciates the bases for [its] actions"), *cert. denied*, 465 U.S. 1025 (1984); *Brown v. Frey*, 807 F.2d 1407, 1412 (8th Cir. 1986) (due process satisfied where "written statement, even though 'sparse in content,' is 'sufficient to inform [the inmate] of the evidence relied upon by the fact-finders' ") (citations omitted).

Here, the Hawaii prison rules grant Mujahid the right to be provided a summary of the evidence the Committee relied upon and a summary of its findings. The Committee's one-sentence statement that it relied upon "the evidence and testimonies presented" provides Mujahid no insight into the basis for the Committee's finding of guilt. *See Wolff*, 418 U.S. at 563. *Accord Redding*, 717 F.2d 1116 ("When the Committee writes 'based on all available evidence the [inmate] is guilty,' no agency or court can discern the basis for the Committee's rulings.") (citation omitted). The Committee's "bare-bones" statement also prevents Mujahid from challenging whether the findings

were supported by substantial evidence. *See Wolff*, 418 U.S. at 564.65. *Accord Culbert v. Young*, 834 F.2d 624, 630 (7th Cir.) ("written requirement is necessary to determine whether the committee's decision [is] based on substantial evidence or whether the decision is sufficiently arbitrary so as to be a denial of due process") (citation omitted), *cert. denied*, 485 U.S. 990 (1988). Although the Committee is not required to give a detailed summary, its deficient statement violated Mujahid's due process rights. *See Wolff*, 418 U.S. at 564-65.

The prison officials contend that even if they violated Mujahid's due process rights by failing to provide a brief summary of the Committee's findings and the evidence relied upon, they are entitled to qualified immunity. We agree.

Government officials who perform discretionary functions are entitled to immunity from damages suits when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 1982).

To support their claim of immunity, the prison officials have provided copies of orders from four prior actions in which the district court reviewed the adequacy of Committee statements. We may take judicial notice of these orders. *See* Fed. R. Evid. 201 (a-c); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (taking judicial notice of document from a separate suit). These orders reveal that the prison officials were aware that it was "clearly established" that the regulations concerning the procedures of the Committee hearings "created a

liberty interest protected by the Due Process Clause." Nevertheless, the orders also indicate that the district court previously found that Committee statements similar to the statement at issue here did not violate a prisoner's due process rights.[5] Thus, the prison officials had a reasonable basis to believe that the statement provided to Mujahid was sufficient.

We conclude that the prison officials could have reasonably believed that their actions were in conformity with the law. *See Harlow*, 457 U.S. at 818. Accordingly, we affirm the district court's determination that the prison officials have qualified immunity from Mujahid's claims for damages. *See Fidelity Fin. Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1437 (9th Cir. 1986) (court may affirm district court's summary judgment on any ground finding support in the record). We also affirm the district court's determination that the Eleventh Amendment bars Mujahid's claims for damages against the prison officials in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985). We remand the case to the district court for consideration of Mujahid's injunctive relief request. *See American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991)

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[5] In three of the actions, the Committee stated that it based its decision on "written reports and testimonies presented at the hearing." This language is nearly identical to the language used in this case.

(noting that qualified immunity does not bar actions for declaratory or injunctive relief).

AFFIRMED AND REMANDED.[6]

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[6] We deny Mujahid's request for attorneys' fees under 42 U.S.C. § 1988. All parties shall bear their own costs on appeal. Fed. R. App. P. 39(a).

APPENDIX "C"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SABIL M. MUJAHID, aka Terry Smith, Plaintiff-Appellant, v. TERA HARPER, Chairman; JEFFREY TOM, Chairperson; ALLAN ANDUHA, Lt., Chairperson, Defendants-Appellees.	No. 92-16588 D.C. No. CV-91-00215-ACK MEMORANDUM* (Filed Jul. 1, 1993)

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted June 21, 1993**

Before: CANBY, FERNANDEZ, and T.G. NELSON, Circuit Judges.

Sabil M. Mujahid, a.k.a Terry Smith, a Hawaii state prisoner, appeals the district court's summary judgment in favor of prison officials in Mujahid's 42 U.S.C. § 1983

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Mujahid's request for oral argument.

action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). We vacate and remand.

I

Background

Prison officials at the Halawa Correctional Facility charged Mujahid with violating two prison rules after Mujahid was found in possession of five postage stamps, which were enclosed in a letter Mujahid addressed to his brother, Frank Smith. The first rule prohibits "[p]ossession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate . . . through regular institution channels." *State of Hawaii, Dep't of Social Servs. and Housing, Title 17, Admin. R. of the Corrections Div.*, Rule 17-201-8(a)(10). The second prohibits "[g]iving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of inmate's or ward's family, or friend." Hawaii Admin. Rule § 17-201-8(a)(31).

The prison Adjustment Committee notified Mujahid that it would conduct a hearing on the charges. Mujahid appeared at the hearing and testified that he received five postage stamps from his brother through the Lieutenant Governor's office in connection with his petition to change his name.[1] The Committee found Mujahid guilty

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[1] It is unclear from the record what other evidence was presented to the Committee. The record includes a copy of the misconduct report, in which Officer Reynold Tenn stated that he

of both charges and sentenced Mujahid to fourteen days of disciplinary segregation under Hawaii Admin. Rule § 17-201-19. The Committee stated that it based its decision "on written reports and testimonies presented at the hearing."

Mujahid filed a complaint alleging the Committee violated his due process rights because it failed to provide an adequate statement of reasons for its decision and because there was insufficient evidence to find him guilty of violating prison rules.[2] Mujahid sought compensatory and punitive damages and injunctive relief.

The prison officials' summary judgment motion was referred to a magistrate judge, who found that although the Committee's "barebones summations" were "deficient" and "lacking in specificity," the Committee's failure to provide a more specific summary did not violate Mujahid's due process rights because the charges against Mujahid were not so complicated and the evidence presented not so voluminous or complex as to make it difficult to determine which witnesses the Committee found credible or what evidence it relied upon. The magistrate judge found that Mujahid's testimony, even if believed, did not excuse the violation of the rules.

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believed Mujahid may have received the stamps from another inmate and Officer Clayton Smith stated that he believed there was probable cause to believe that misconduct had occurred.

[2] In his complaint, Mujahid also alleged the disciplinary segregation violated his first and eighth amendment rights. Mujahid, represented by counsel, has failed to raise these issues on appeal. Accordingly, we need not address them. *See Eberle v. City of Anaheim*, 901 F.2d 814, 817-18 (9th Cir. 1990) (any claim not raised in the opening brief is deemed waived).

The district court granted summary judgment, holding that although Mujahid's due process rights were implicated, there was some evidence supporting the Committee's decision and the Committee's statement of reasons was adequate.

II

Analysis

Mujahid contends the district court erred by granting summary judgment because prison officials violated his due process rights because they failed to provide an adequate statement of reasons for their decision, and the evidence offered at his disciplinary hearing was insufficient to support a finding of guilt. This contention has merit.[3]

A plaintiff may bring an action for civil rights violations under 42 U.S.C. § 1983 by demonstrating that defendants, acting under color of state law, deprived plaintiff

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[3] Mujahid also argues, for the first time on appeal, that the rules under which he was convicted are unconstitutionally vague. Generally, we decline to consider issues not raised before the district court absent extraordinary circumstances. *Pacific Express Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir.), *cert. denied*, 113 S. Ct. 814 (1992). Mujahid contends that he raised this argument below when he argued that prison officials misinterpreted the Rule 17-201-18(31). We disagree with the attempted characterization. Mujahid argued to the district court that the prison officials misinterpreted the prison rules and that he was innocent to the offense charged, not that he was unable to conform his conduct because the rules were vague. Because we find no exceptional circumstances, we decline to consider Mujahid's argument. *See id.*

of a right guaranteed under the Constitution or a federal statute. 42 U.S.C. § 1983; *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988).

A liberty interest protected by the fourteenth amendment may arise either from the due process clause itself or from the laws of the states. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). If a state requires certain procedures before an inmate may be placed in disciplinary segregation, then a liberty interest may be created. *See Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983).[4] A state creates a protected liberty interest "by placing substantive limits on official discretion." *Thompson*, 490 U.S. at 462. "The use of the word, shall, [in connection with specific substantive predicates for action] constitutes the mandatory language needed to create a liberty interest." *Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

Hawaii prison rules provide that an "inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken." Hawaii Admin. R. § 17-201-18(c). The rules also provide that "[a] finding of guilt shall be made where: . . . (2) the charge is supported by substantial evidence." Hawaii Admin. R. § 17-201-18(b)(2). Thus, Hawaii's rules contain the

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[4] In *Hewitt*, the court found a liberty interest where inmate was placed in administrative segregation. 459 U.S. at 471-72. *Cf. Olim v. Wakinekona*, 461 U.S. 238, 250 (1987) (no liberty interest where inmate was transferred).

"explicitly mandatory language" necessary to create a protected liberty interest. *See Hewitt*, 459 U.S. at 471-72.

Due process requires, at a minimum, that inmates facing disciplinary sanctions be provided "advance written notice of the claimed violation and a written statement of . . . the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). *Accord Redding v. Fairman*, 717 F.2d 1105, 1116 (7th Cir. 1983) (integrity of a prison disciplinary committee's decision "can be insured only if [it] enunciates the bases for [its] actions"), *cert. denied*, 465 U.S. 1025 (1984); *Brown v. Frey*, 807 F.2d 1407, 1412 (8th Cir. 1986) (due process satisfied where "written statement, even though 'sparse in content,' is 'sufficient to inform [the inmate] of the evidence relied upon by the factfinders' ") (citations omitted).

Here, the Hawaii prison rules grant Mujahid the right to be provided a summary of the evidence the Committee relied upon and a summary of its findings. The Committee's one-sentence statement that it relied upon "the evidence and testimonies presented" provides Mujahid no insight into the basis for the Committee's finding of guilt. *See Wolff*, 418 U.S. at 563. *Accord Redding*, 717 F.2d 1116 ("When the Committee writes 'based on all available evidence the [inmate] is guilty,' no agency or court can discern the basis for the Committee's rulings.") (citation omitted). The Committee's "bare-bones" statement also prevents Mujahid from challenging whether the findings were supported by substantial evidence. *See Wolff*, 418 U.S. at 564-65. *Accord Culbert v. Young*, 834 F.2d 624, 630 (7th Cir.) ("written requirement is necessary to determine

whether the committee's decision [is] based on substantial evidence or whether the decision is sufficiently arbitrary so as to be a denial of due process") (citation omitted), *cert. denied*, 485 U.S. 990 (1988). Although the Committee is not required to give a detailed summary, its deficient statement violated Mujahid's due process rights. *See Wolff*, 418 U.S. at 564-65.

The prison officials contend that even if they violated Mujahid's due process rights by failing to provide a brief summary of the Committee's findings and the evidence relied upon, the district court's summary judgment should be upheld because they are entitled to qualified immunity.

Qualified immunity is unavailable to state officials who knowingly violate a clearly established constitutional right. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). An inmate's right to a specific written statement of the reasons for disciplinary action was clearly established at the time of the alleged violation. *See Wolff*, 418 U.S. at 563. The prison officials may have been uncertain as to the degree of specificity required by due process. *See Zimmerlee v. Keeney*, 831 F.2d 183, 188 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2851 (1988) ("Wolff provides little guidance as to the specificity of notice necessary to satisfy due process."). *Accord Saenz v. Young*, 811 F.2d 1172, 1173-74 (7th Cir. 1987) (committee's brief statement that is found inmate guilty of charge was sufficient to satisfy due process where evidence and violation were uncomplicated). The magistrate judge's report indicates, however, that, on four previous occasions, the district court had reviewed the Halawa prison officials' failure to provide inmates a sufficient statement of the reasons for their disciplinary

findings. Because it is unclear from the record whether the prison officials could have reasonably believed that their actions were in conformity with the law, *see Procunier*, 434 U.S. at 562, we vacate the district court's summary judgment on Mujahid's due process claim.[5]

VACATED AND REMANDED.[6]

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[5] Because the Committee did not provide a summary of the evidence upon which it relied, we are unable, on this record, to determine whether substantial evidence supports the Committee's determination.

[6] We deny Mujahid's request for attorneys' fees under 42 U.S.C. § 1988. *See Hanrahan v. Hampton*, 446 U.S. 754, 759 (1980) (attorneys' fees pursuant to section 1988 are available only to a prevailing party who has prevailed on the *merits* of a claim after a determination of the substantial rights of the parties). All parties shall bear their own costs on appeal. Fed. R. App. P. 39(a).

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

SABIL MUJAHID aka TERRY SMITH, Plaintiff, v. TERA HARPER, et al., Defendants.	Civil No. 91-00215ACK/DGC (Filed Aug. 20, 1992)

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

I. INTRODUCTION

The Court adopts the Magistrate's recommendation that Defendants' summary judgment motion be granted for the following reasons: *one*, although Plaintiff has a liberty interest created by the Inmate Handbook, there has been no violation of his Due Process rights; *two*, this Court declines to exercise its jurisdiction over Plaintiffs' state law claim that Defendants misinterpreted prison rules; and *three*, Plaintiff's Eighth Amendment rights have not been violated.

II. BACKGROUND

Sabil Mujahid ("Plaintiff"), a *pro se* prisoner, filed a 42 U.S.C. § 1983 civil rights complaint based on alleged violations of his First, Eighth, and Fourteenth Amendment rights by Tera Harper, Jeffrey Tom and Alan

Anduha ("Defendants"). Defendants are all members of the adjustment committee that presided over a March 1, 1991 disciplinary hearing involving Plaintiff. Plaintiff seeks a declaratory judgment, compensatory and punitive damages against Defendants in their official and individual capacities, injunctive relief, expunction of his records, and costs and attorney fees.

On December 28, 1990, while at Halawa Correctional Facility (HCF), Plaintiff was "written up" for alleged violations of HCF regulations. The "write-up" alleges that on or about December 28, 1990, Plaintiff placed a letter in the prison mail system addressed to Frank K. Smith, his brother. Marked on the outside of the letter were the words, "Do not bend. Photo's inside. 5 stamps enclosed."

Renold Tenn, an Adult Corrections Officer (ACO), itemized and confiscated the contents of the envelope since he believed that Plaintiff may have received the stamps from another inmate in violation of prison rules. ACO Tenn filed a report alleging that Plaintiff had violated two prison rules, § 17-201-8(a)(10) and § 17-201-8(a)(31). Those rules state, in pertinent part:

> acts constitution misconduct of moderate category shall be as follows . . .
>
> (10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels;
>
> (31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family, or friend.

Plaintiff informed the adjustment committee that he had received the stamps from his brother, not another inmate. However, after considering the evidence, Defendants found Plaintiff guilty of both charges and ordered Plaintiff to spend fourteen days in disciplinary segregation.

Plaintiff argues he has a protected liberty interest, and that Defendants deprived him of that liberty without due process of law, in violation of the Fourteenth Amendment. He claims they failed to provide him with a summary of the evidence that was considered by the adjustment committee or the written reasons for their findings. Plaintiff contends that the *State of Hawaii, Department of Social Services and Housing, Title 17, Administrative Rules of the Corrections Division: Inmate Handbook* ("Inmate Handbook") has provisions which prove Defendants did not comply with due process requirements. Also, Plaintiff contends that placing him in disciplinary segregation for fourteen days violated his Eighth Amendment rights.

Defendants filed a motion for judgment on the pleadings, or in the alternative, for summary judgment. Defendants contends that no liberty interest was at stake; adequate process was afforded to Plaintiff; they did not cause an injury to Plaintiff; and they are immune from liability based on the doctrines of sovereign and qualified immunity. Plaintiff responded to this motion and filed his own motion for summary judgment.

On May 4, 1992, the Magistrate submitted a Report and Recommendation to enter Summary Judgment in favor of Defendants. The Magistrate agreed with Plaintiff

that a liberty interest exists; however, the Magistrate ultimately found that the constitutional requirements of due process were satisfied, and that Plaintiff's placement in disciplinary segregation did not constitute cruel and unusual punishment. Defendants have objected in part to the Magistrate's finding that a liberty interest exists. Plaintiff objects to summary judgment based on his belief that a genuine issue of material fact exists, and that Defendants did not fully comply with the prison's procedural rules.

III. DISCUSSION

A. Legal standard for summary judgment.

A motion for summary judgment is granted as a matter of law when the evidence and inferences, viewed most favorably to the nonmoving party, show that no genuine issue as to any material fact exists. Federal Rules of Civil Procedure, Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is inappropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983).

The moving party bears the initial responsibility of showing the absence of a genuine issue for trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Defendants assert that Plaintiff has not established that a liberty interest has been violated. To prevent summary judgment, Plaintiff must present a material issue of fact that due to the acts of prison officials, he was deprived of his rights to Due Process by his placement in administrative segregation. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983);

Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

B. Due Process

1. A liberty interest has been created by the procedures set up to guide Adjustment Committee proceedings.

Plaintiff contends that the state created a liberty interest in the adjustment committee proceedings. The Supreme Court has previously held that if state law provides for certain mandatory procedures prior to confining inmates in disciplinary segregation, a liberty interest may be created in the *process*, although there is no substantive liberty interest in the security classification itself. *See Hewitt v. Helms*, 459 U.S. 460 (1983). The Court noted in *Hewitt* that although great deference to prison officials should be given in promoting safety, "the repeated use of explicitly mandatory language in requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." 459 U.S. at 472. States can also create a liberty interest by placing substantial limitations on official discretion to confine inmates in segregation. *Olim v. Wakinekona*, 461 U.S. 237, 249 (1983). However, the state's standards must eliminate all discretion in decision-making to create a protected liberty interest – mere guidelines are not enough. *Baumann v. Arizona Department of Corrections*, 754 F.2d 841 (9th Cir. 1985).

Plaintiff relies on the Inmate Handbook, arguing that this establishes specific procedures which prison officials must follow in adjustment committee proceedings.

Through the use of the words "shall" and "will", the Inmate Handbook clearly establishes mandatory procedures. Some of the relevant rules include:

> Rule § 17-201-16(a): the inmate shall receive prior notice that an adjustment committee hearing will be held regarding the individual.
>
> Rule § 17-201-17(a): the inmate or ward has a right to appear at the adjustment committee hearing . . .
>
> (b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward . . .
>
> (f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.
>
> Rule § 17-201-18(a): the inmate has a right to be appraised [sic] of the findings of the adjustment committee.
>
> (c) The inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken . . .

These rules do not leave prison officials any discretion with respect to the procedures to be followed. Thus, the Court finds that inmates do have a liberty interest at stake in an adjustment committee proceeding.

2. However, Plaintiff was not deprived of his rights, as he received the process that was due him.

Although Plaintiff has a liberty interest created by the guidelines set up by the Inmate Handbook rules, Plaintiff has failed to demonstrate that his Due Process rights were violated. Once Plaintiff demonstrates that he has a liberty interest in having the procedures set up by the Inmate Handbook rules followed, the procedures that were actually afforded Plaintiff must be scrutinized to determine if they fulfill the minimum requirements of due process. *See Hewitt*, 459 U.S. at 472. In *Hewitt*, a prisoner was put in administrative segregation prior to a hearing. The Supreme Court held that because there were hearings soon after the segregation, at which the prisoner was allowed to present his views, there was no violation of due process. *Id.* Also, in *Wolff v. McDonnell*, 418 U.S. 539, (1974), the Supreme Court held that minimum due process is satisfied when prisoners in disciplinary hearings have "advanced written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." 418 U.S. at 563. Both *Hewitt* and *Wolff* determined that the interpretation of the Due Process Clause is flexible. Thus, prisoners cannot expect the same procedures due process requires for free citizens. *Hewitt* 459 U.S. at 472; *Wolff* 418 U.S. at 560. Instead, the process afforded prisoners must be balanced between the government interest and the prisoner's private interest. *Id.*

Although the adjustment committee did not accurately follow the procedural guidelines established in the Inmate Handbook, as their written report finding against

Plaintiff lacked specificity, Plaintiff's Due Process rights were nevertheless preserved because the adjustment committee satisfied the minimum requirements of the process that was due Plaintiff. Plaintiff had advance notice of the violation, the opportunity to hear the evidence against him, the opportunity to present his views, and the committee's findings against him were stated in writing.

Plaintiff's basic complaint is that the written summary of the evidence presented against him is not specific enough. However, the specificity of the evidence relied upon by the adjustment committee may not be significant in their finding that Plaintiff violated the Inmate Handbook Rules. In assessing the alleged violation of Rule § 17-201-8(a)(31), under the evidence presented, there were three possible scenarios that the adjustment committee could find: Plaintiff either received the stamps from (1) his brother; (2) another inmate; or (3) the Lieutenant Governor's Office. It can be easily inferred from the committee's finding of a violation of Rule § 17-201-8(a)(31) that it did not believe Plaintiff had received the stamps from the Lieutenant Governor's Office. If the committee had believed that story, this rule would not have been implicated at all. Therefore, the committee must have believed either that Plaintiff received the stamps from his brother, or that he received them from another inmate. Next, because the adjustment committee appears to have interpreted Inmate Handbook Rule § 17-201-8(a)(31) (see *supra* at 2) as prohibiting inmates from receiving anything of value from *any* inmate's family member (including the inmate's own

family),[1] the committee would have found that Plaintiff violated the rules regardless of which scenario it believed. Therefore, the adjustment committee's written report did not need any further specificity to support its findings that the Plaintiff violated Rule § 17-201-8(a)(31). The committee apparently believed that Plaintiff received the stamps either from another inmate or from his brother, not from the Lieutenant Governor's Office.

Additionally, the adjustment committee found that Plaintiff had violated Rule § 17-201-8(10), which prohibits inmates from possessing anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels. By Plaintiff's own pleadings, he admits that he obtained the stamps either from his brother or through the office of the Lieutenant Governor. The Defendants, in their moving papers, establish that neither of these sources constitute "institutional channels." Accordingly, there is no dispute that Plaintiff did in fact violate Rule § 17-20-8(10). Therefore, the report need not specify with any more detail why Plaintiff was found to have violated this Rule. There was no alternative finding the committee could have made – whether it believed Plaintiff or the ACO, Plaintiff was guilty of violating this rule. Even if the finding of a violation of Rule § 17-201-8(a)(31) was

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[1] *See* Motion for Summary Judgment at p.13. ("[I]t is fairly obvious why the Adjustment Committee ruled as it did. There is no question as to what the committee believed Plaintiff did. Specifically, he sent stamps, which are something having value, to his brother, a family member. This violates prison rules.").

not specific enough, this finding alone would support Plaintiff's confinement in administrative segregation.

This Court suggests that in the future, prison officials state the specific evidence relied upon for their findings. This would ensure the validity of their decisions and prevent similar disputes from arising.

C. Plaintiff's assertion that a "material issue of fact exists" is based on Defendant's mistaken interpretation of a state prison rule, which this court declines to review.

This court has jurisdiction based on Plaintiff's 42 U.S.C. § 1983 complaint which asserted that Defendants violated his constitutional rights under the color of state law. Since Defendants did not violate Plaintiff's constitutional right to due process, the only other issue at hand is Plaintiff's contention that Defendants misinterpreted Inmate Handbook Rule § 17-201-8(31) (see *supra* at 2). Plaintiff asserts that by misinterpreting Rule § 17-201-8(31), defendants denied him his Due Process rights. Although Plaintiff has a Due Process right to procedural safeguards before being sent to disciplinary holding, he does not have a Due Process right to the correct interpretation of state prison rules. *Cf. McCarthy v. Jones,* 449 F.Supp. 480, 483 (S.D. Ala. 1978) (no constitutional violation if mistake by tax officials was not palpably arbitrary or grossly unequal in its application to the persons involved). Plaintiff has no cause of action under 42 U.S.C. § 1983 since the mistake in the interpretation of the prison rules did not cause the encroachment of his Due Process rights. Thus, a claim that the prison rule was

mistakenly interpreted is a cause of action under State law, and this Court declines to exercise its jurisdiction to hear that claim.

D. Plaintiff's Eighth Amendment right was not violated.

Plaintiff also contends that Defendants violated his Eighth Amendment rights against cruel and unusual punishment by placing him in disciplinary segregation. In evaluating whether an Eighth Amendment violations [sic] exists, the courts use objective criteria, including (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 292 (1983). Plaintiff has not alleged that his placement in disciplinary segregation differed from the objective standard of similarly-situated persons. Also, his placement did not deprive him of any basic rights; he still had shelter, three meals a day, access to a law library and five hours of exercise a week. Thus, this Court rejects Plaintiff's contention that disciplinary segregation constituted cruel and unusual punishment.

E. Sovereign and qualified immunity.

In the alternative, if there has been a constitutional violation, the Court finds that the defenses of sovereign and qualified immunity would be available to Defendants. The Eleventh Amendment bars suits for damages against the State and against State officials sued in their

official capacities. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Will v. Michigan Department of State Police, et al.*, 109 S.Ct. 2304 (1989); *Monell v. New York Department of Social Services*, 436 U.S. 658, 690 (1978). Therefore, Defendants, insofar as they are sued in their official capacities, are entitled to sovereign immunity.

Government officials who perform discretionary functions are protected from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Insofar as they are sued in their individual capacities, Defendants are entitled to qualified immunity because a reasonable person would not have known that misinterpretation of a state prison rule would violate a prisoner's constitutional rights.

IV. CONCLUSION

Though Plaintiff does have a liberty interest, no violation of his Due Process rights occurred because he received the minimum process that was due him. Also, this Court declines to exercise its jurisdiction over Plaintiff's state claim that Defendants mistakenly interpreted a state prison rule. Finally, Plaintiff's placement in disciplinary segregation does not constitutes cruel and unusual punishment; thus, his eighth amendment rights have not been violated. In the alternative, if some constitutional violation has occurred, the Court finds that Defendants are entitled to sovereign and qualified immunity. Therefore, the Magistrate's recommendation that

Defendants' Motion for Summary Judgment be granted is hereby ADOPTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 20 1992 .

/s/ Alan C. Kay
Chief United States
District Judge

SABIL MUJAHID aka TERRY SMITH V. TERA HARPER, et al.; CIV. NO. 90-00215ACK/DGC; ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION.

APPENDIX "E"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SABIL M. MUJAHID, aka Terry Smith, Plaintiff-Appellant, v. TERA HARPER, Chairman; JEFFREY TOM, Chairperson; ALLAN ANDUHA, Lt., Chairperson, Defendants-Appellees.	No. 92-16588 D.C. No. CV-91-00215-ACK ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC (Filed Apr. 5, 1994)

Before: CANBY, FERNANDEZ, and T.G. NELSON, Circuit Judges.

The panel has unanimously voted to deny the appellant's [sic] petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX "F"

(Seal)

STATE OF HAWAII

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

TITLE 17, ADMINISTRATIVE RULES OF THE CORRECTIONS DIVISION

INMATE HANDBOOK

OCTOBER 1983

[MATERIAL DELETED]

SUBCHAPTER 2
THE ADJUSTMENT PROCESS

§17-201-4 *General provisions.* The adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-5 *Rights, privileges, and responsibilities.* (a) The rights and privileges of all inmates and wards shall be as follows:

(1) You may expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.

(2) You shall be informed of the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the right to freedom of religious affiliation, and voluntary religious worship.

(4) You will be provided health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation, regular exercise period, toilet articles, and medical and dental treatment.

(5) You may reasonably correspond and visit with family members, friends, and other persons according to the rules and schedules of the facility where there is no threat to security, order, or correctional programming.

(6) You may have access to the courts by correspondence on matters such as the legality of your conviction, pending criminal cases, or the conditions of your confinement.

(7) You may utilize reading material for educational purposes and for your own enjoyment.

(8) You have the right to participate in counseling, education, vocational training, employment, and other programs as far as resources are available and in keeping with your interests, needs, and abilities.

(b) The responsibilities of all inmates and wards shall be as follows:

(1) You have the responsibility to treat others respectfully, impartially, and fairly.

(2) You have the responsibility to know and abide by the rules, procedures, and schedules concerning the operation of the institution.

(3) You have the responsibility to recognize, respect, and not interfere with the rights of others.

(4) It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.

(5) It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.

(6) You have the responsibility to present to the court honestly and fairly your petitions, questions, and problems.

(7) It is your responsibility to seek and utilize reading materials for personal benefit, without depriving others of their equal right to the use of this material.

(8) You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3 (Imp: HRS §353-3)

§17-201-6 *Prohibited acts within institutions of the division; greatest misconduct category.* (a) Acts constituting misconduct of the greatest category shall be as follows:

(1) Sexual assault.

(2) Killing.

(3) Assaulting any person, with or without a dangerous instrument, causing bodily injury.

(4) The use of force on or threats to a correctional worker or the worker's family.

(5) Escape:

(A) From closed confinement, with or without threat of violence;

(B) From an open facility or program involving the use of violence or threat of violence.

(6) Setting a fire.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damage of $1,000 or more, including irreplaceable documents.

(8) Adulteration of any food or drink which does or could result in serious bodily injury or death.

(9) Possession or introduction of an explosive or ammunition.

(10) Possession or introduction of any firearm, weapon, sharpened instrument, knife, or other dangerous instrument.

(11) Rioting.

(12) Encouraging others to riot.

(13) The use of force or violence resulting in the obstruction, hindrance, or impairment

of the performance of a correctional function by a public servant.

(14) Any lesser and reasonably included offense of the acts in paragraph (1) to (13).

(15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to sixty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-7 *Prohibited acts; high misconduct category.* (a) Acts constituting misconduct of high category shall be as follows:

(1) Fighting with another person.

(2) Threatening another person, other than a correctional worker, with bodily harm, or with any offense against the other person or the other person's property.

(3) Extortion, blackmail, protection: demanding or receiving anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.

(4) Assaulting any person without weapon or dangerous instrument.

(5) Escape from an open institution or program, conditional release center, or work

release furlough which does not involve the use or threat of violence.

(6) Attempting or planning escape.

(7) Destroying, altering, or damaging government property or the property of another person resulting in damages between $500-$999.99.

(8) Tampering with or blocking any locking device.

(9) Adulteration of any food or drink which could or does result in bodily injury or sickness.

(10) Possession of an unauthorized tool.

(11) Possession or introduction or use of any narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff.

(12) Possession of any staff member's clothing or equipment.

(13) Encouraging or inciting others to refuse to work or to participate in work stoppage.

(14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

(15) Giving or offering any public official or staff member a bribe.

(16) Any lesser and reasonably included offense of paragraphs (1) to (15).

(17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to thirty days.

(2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-8 *Prohibited acts; moderate misconduct category.* (a) Acts constituting misconduct of moderate category shall be as follows:

(1) Engaging in sexual acts.

(2) Making sexual proposals or threats to another.

(3) Indecent exposure.

(4) Wearing a disguise or a mask.

(5) Destroying, altering, or damaging government property or the property of another person resulting in damages between $50-$499.99.

(6) Theft.

(7) Misuse of authorized medication.

(8) Possession of unauthorized money or currency.

(9) Loaning of property or anything of value for profit or increased return.

(10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.

(11) Refusing to obey an order of any staff member.

(12) Violating a condition of any community release or furlough program.

(13) Unexcused absence from work, or other authorized assignment.

(14) Failing to perform work as instructed by a staff member.

(15) Lying or providing false statements, information, or documents to a staff member, government official, or member of the public.

(16) Counterfeiting, or unauthorized reproduction of any document, article, or identification, money, security, or official paper.

(17) Participating in an unauthorized meeting or gathering.

(18) Being in an unauthorized area.

(19) Failure to follow safety or sanitary rules.

(20) Using any equipment or machinery which is not specifically authorized.

(21) Using any equipment or machinery contrary to instructions or posted safety standards.

(22) Failing to stand count.

(23) Interfering with the taking of count.

(24) Making intoxicants or alcoholic beverage.

(25) Being intoxicated.

(26) Gambling.

(27) Preparing or conducting a gambling pool.

(28) Possession of gambling paraphernalia.

(29) Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted safety standards.

(30) Unauthorized contacts with the public or other inmates.

(31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family, or friend.

(32) Any lesser and reasonably included offense of paragraphs (1) to (31).

(33) Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to fourteen days.

(2) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-9 *Prohibited acts; low moderate misconduct category.* (a) Acts constituting misconduct of low moderate category shall be as follows:

(1) Destroying, altering, or damaging government property, or the property of another person resulting in damage less than $50.

(2) Possession of property belonging to another person.

(3) Possessing unauthorized clothing.

(4) Malingering, feigning an illness.

(5) Using abusive or obscene language to a staff member.

(6) Smoking where prohibited.

(7) Tattooing or self mutilation.

(8) Unauthorized use of mail or telephone.

(9) Correspondence or conduct with a visitor in violation of rules.

(10) Any lesser and reasonably included offense of paragraphs (1) to (9).

(11) Any other criminal act which the Hawaii Penal Code classifies as a petty misdemeanor.

(12) Harassment of employees.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

(1) Disciplinary segregation up to four hours in cell.

(2) Monetary restitution.

(3) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-10 *Prohibited acts; minor misconduct category.* (a) Acts constituting misconduct of minor category shall

be any criminal act which the Hawaii Penal Code classifies as a violation.

(b) Sanctions which may be imposed as punishment for acts in subsection (a) shall include one or more of the following:

(1) Loss of privileges (i.e., community recreation; commissary; snacks; cigarettes, smoking; personal visits – no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days).

(2) Impound inmate's personal property.

(3) Extra duty.

(4) Reprimand.

(c) Attempting to commit any of the above acts, aiding another person to commit any of the above acts, and conspiring to commit any of the above acts shall be considered the same as a commission of the act itself. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-11 *Minor misconduct; Adjustments.* (a) A minor rule violation is defined as that which poses no serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution or subjects the individual to the imposition of lesser penalties. Such misconduct may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate or ward. The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that

the individual is not guilty of the alleged misconduct. The following sanctions may be imposed:

(1) Loss of privileges; e.g., community recreation; commissary; snacks, cigarettes; smoking; personal visits no longer than fifteen days; personal correspondence no longer than fifteen days; personal phone calls.

(2) Impound inmate's or ward's personal property.

(3) Extra duty.

(4) Reprimand.

(b) The officer shall prepare a brief written report to be given to and placed in the individual's file, indicating the infraction, the sanction, and the date or dates the sanction is to be or was carried out. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-12 *Serious misconduct.* A serious rule violation is defined as that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours. Such misconduct shall be punished through the adjustment committee pursuant to the procedures in sections 17-201-13 to 17-201-20. [Eff. Oct. 6, 1983] (auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-13 *Adjustment committee.* The adjustment committee shall be normally composed of at least three members who are not actually biased against the inmate or ward. A small facility may designate one person to act

in the capacity of the adjustment committee. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-14 *Pre-hearing detention.* An inmate or ward may be detained for a reasonable time pending an adjustment committee hearing if, in the judgment of the facility administrator, detention is necessary:

(1) To protect life or limb;

(2) For the security or good government of the facility;

(3) To protect the community;

(4) For any other good reason. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-15 *Pre-hearing investigation.* (a) A staff member may conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate or ward committed misconduct. If the staff member finds sufficient cause to believe that a rule violation has occurred, the adjudication procedures may be initiated. Additionally, the pre-hearing investigator may present the evidence against the inmate or ward to the adjustment committee.

(b) The implementation of a pre-hearing investigation shall be within the facility administrator's discretion. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-16 *Notice.* (a) The inmate or ward shall receive prior notice that an adjustment committee hearing will be held regarding the individual.

(b) Within a reasonable time, not less than twenty-four hours before the hearing, the charged inmate or

ward shall be served with written notice of the time and place of the adjustment committee hearing, what the specific charges are, including a brief notation of the facts. If the inmate or ward waives the twenty-four hour period, the waiver shall be reduced to writing and signed by the inmate or ward on the face of the notice.

(c) The inmate or ward or counsel substitute shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(d) The misconduct report or summary shall briefly contain the following:

(1) The specific rule violated;

(2) The facts supporting the charge;

(3) Any unusual inmate or ward behavior;

(4) Any staff or inmate or ward witnesses; the disposition of any physical evidence (e.g., weapons); and

(5) Any immediate action taken. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-17 *Hearing.* (a) The inmate or ward has a right to appear at the adjustment committee hearing, except where institutional safety or the good government of the facility would be jeopardized. If the individual is excluded from the hearing, reasons shall be given in writing. If the inmate or ward declines to attend the hearing, it shall be held regardless of the inmate's or ward's absence.

(b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward. The inmate or ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(1) A plea of guilty eliminates the need to consider other evidence against the inmate or ward who shall then be given an opportunity to explain the actions or offer evidence in mitigation.

(2) A plea of not guilty necessitates the consideration of evidence against the inmate or ward.

(c) The inmate or ward shall be advised of the right to remain silent, but that silence may be used as a permissible inference of guilt. An inmate or ward cannot, however, be compelled to testify against oneself without the granting of immunity and may not be required to waive that immunity.

(d) Formal rules of evidence shall not apply. The committee may rely on any form of evidence, documentary, or testimonial, that it believes is reliable.

(e) Confrontation and cross examination:

(1) The inmate or ward may be given the privilege to confront and cross examine adverse witnesses.

(2) The committee may deny confrontation and cross examination and identification of adverse witnesses if in its judgment such a confrontation would:

(A) Subject the witnesses to potential reprisal;

(B) Jeopardize the security or good government of the facility;

(C) Be unduly hazardous to the facility's safety or correctional goals; or

(D) Otherwise reasonably appear to be impractical or unwarranted.

(3) If confrontation and cross examination and identification of adverse witnesses are denied, the committee is encouraged to enter in the record of the proceeding and make available to the inmate or ward an explanation for the denial. Additionally, the inmate or ward may be given an oral or written summary of the confidential evidence against the individual and provided an opportunity to respond.

(f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.

(1) The inmate or ward should be permitted to call witnesses and present evidence of defense as long as it will not be unduly hazardous to institutional safety or correctional goals.

(2) The committee may deny the inmate's or ward's calling of certain witnesses or presentation of certain evidence, after being given an offer of proof as to the nature of the evidence, for reasons such as:

(A) Irrelevance;

(B) Lack of necessity;

(C) The hazards presented in individual cases; or

(D) Any other justifiable reason.

In this regard, the committee may keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate or ward to be heard. The committee is encouraged to state the reason for the refusal.

(g) An inmate or ward shall be permitted to employ counsel substitute. A counsel substitute shall be a member of the facility staff who did not actively participate in the process by which the individual was brought before the committee or, in the facility administrator's discretion, a sufficiently competent inmate or ward designated by the facility staff. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-18 *Findings.* (a) The inmate or ward has a right to be apprised of the findings of the adjustment committee.

(b) Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

(1) The inmate or ward admits the violation or pleads guilty.

(2) The charge is supported by substantial evidence.

(c) The inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason or reasons therefor must be set forth in the findings. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-19 *Punishment.* (a) The adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited, provided that physical force may be employed for self defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate or ward pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the adjustment committee:

(1) Temporary loss of privileges.

(2) Segregation or confinement not longer than sixty days, provided that a longer period may be imposed with the expressed written approval of the corrections division administrator, and the committee shall review the

inmate's or ward's confinement at least once every thirty days.

(3) Any other punishment deemed necessary by the adjustment committee.

(b) The committee may also refer the matter to the program committee for further action. A description of the basic living levels of disciplinary confinement shall be as provided in subsections (c) to (h).

(c) The quarters used for segregation should be ventilated, adequately lighted, and maintained in a sanitary condition by the inmate or ward at all times. Normally, a segregated inmate or ward should be entitled to clothing, and bedding. If an inmate or ward is likely to destroy the clothing or bedding, injure oneself, or create a disturbance detrimental to others, or for other good reasons, materials may be removed from the cell until the condition which prompted removal subsides.

(d) Segregated inmates or wards shall be given an adequately nutritious diet.

(e) Segregated inmates or wards shall maintain an acceptable level of personal hygiene.

(f) Each segregated inmate or ward should be permitted indoor or outdoor exercise, unless security or institutional government dictates otherwise.

(g) Personal property will ordinarily be impounded, inventoried, and receipted.

(h) Normally, religious and legal materials are permitted. However, inmates or wards may be denied all reading and legal materials during temporary confinement for not longer than fifteen days. Access to legal

materials shall be permitted if an inmate or ward demonstrates the need for the materials and for prompt access to the courts in preparation of a habeas corpus petition or other application for relief. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-20 *Review.* (a) Each inmate or ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of the day of receipt of the committee's decision.

(b) The facility administrator may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may demand any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

APPENDIX "G"

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS
MISCONDUCT REPORT

Facility: HHSF
Prepared on: 01/02/91

TO: Captain Charles Akana, Second Watch
(Supervisor/Hearing Officer)

FROM: ACO III Reynold Tenn
(Name, Title – Reporting Officer)

RE: INMATE TERRY SMITH
(Name of Violator)

SSN: _____
(ID Number)

FACTS CONCERNING THE MISCONDUCT: (Give time occurred/discovered, rule(s) violated, location, what happened and time the incident ceased or was corrected.)

On Friday, 12/28/90, at approximately 0745 hours, this writer, ACO III Reynold TENN, was assigned to the HCF mailroom. At this time, I observed an outgoing letter from inmate Terry SMITH addressed to: Frank K. Smith, 1514 Campbell Street, Kansas City, MO 64106. Marked on the outside of this letter were the words, "Do not Bend. Photo's inside. 5 stamps enclosed." At this time, I inspected and took inventory of the contents. Even though inmate SMITH claims indigent status, he had five stamps being mailed out in an envelope that is marked "NF" (No Funds). I believe that inmate SMITH may have received these stamps from another inmate.

A property receipt by mail (#6327) was used to itemize the contents and also to notify in SMITH of his letter being confiscated as evidence and a 107 to follow.

Therefore, inmate Terry Smith may be in violation of 17-201-8(10) Possession of anything authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels and 17-201-8(31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family or friend.

/s/ Reynold Tenn ACO III
Signature of Reporter

INVESTIGATION: (by supervisor – statements of violator, witness(es))

On 02/08/91, at approximately 1220 hours, I, ACO III Clayton Smith, conducted an investigation on the above charges against inmate Terry Smith. The investigation was held in the Special Holding Unit of the High Security Facility. Inmate Smith was given his rights and asked if he wanted to make any statements on his behalf concerning this matter. Inmate Smith stated, "I will not say anything until I go to the Adjustment Committee Hearing."

After reviewing all facts and statements, I feel that there is probable cause to believe that a misconduct did occur. I further recommend that this matter be referred to the Adjustment Committee for their review.

[doc 0066Y-3]

FINDINGS:

[ ] Guilty

[ ] Not Guilty

[X] Referred to Facility/Unit Adjustment Committee

CHARGE(S)		RULE #
17-201-8	Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.	10
17-201-8	Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's family or friend.	31

INFORMAL ADJUSTMENT BY SUPERVISOR/HEARING OFFICER:

[ ] Withdrawal of: _____

[ ] Extra work assigned

[ ] Confinement

PERIOD OF CORRECTIVE ACTION:

_____ hours, OR

Beginning _____ (time), _____ (day)

and ending _____ (time), _____ (day)

BY: _____ _____ DATE: _____
(Investigator/ Hearing Officer) (Title)

Acceptance of findings and disposition:

_____ _____
(Inmate) (Date)

Receipt witnessed by:

_____ _____ _____
(Name) (Title) (Date)

REVIEWED BY: /s/ William Kawelo
(Name Supervisor)

ACO V LT. 2-11-91
(Title) (Date)

STATE OF HAWAII
Department of Corrections

Facility HHSF

SMITH, Terry
(Name) (Number)

NOTICE OF REPORT OF MISCONDUCT

Date 02/15/91 Time 1600
(Date)

- You are herein notified that a written report of misconduct was filed against you on 12/28/90. A copy of the charge(s) are listed below.
- A hearing on the charge(s) has been scheduled and you are to be present at
  Parole Board Room HHSF ,
  (Location)

  1000 , on February 26 , 1991 .
  (Time) (Date)

As required by Corrections Division procedure, this hearing has been scheduled to determine the facts and administer just corrective action. You have the right to: 1) Have any charge explained to you; 2) Question those who have made any charge against you and examine any written material concerning the charge; 3) Explain any charge brought against you; 4) Request an administrative review through the adjustment process.

Charge(s):

17-201-8(10) possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels

17-201-8(31) giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's family or friend.

Facts supporting the charge(s) are as stated on the attached Misconduct Report.

/s/ Tera Harper
(Chairman)

Receipt of notice of charges and rights:

I acknowledge receipt of the above charges. I understand that I: may ____/may not X , have legal counsel present at the hearing. I also understand that I have 24 hours notice prior to the hearing.

I do X I do not ___ waive legal counsel.

I do ___ I do not X waive my right to 24 hour prior notice.

/s/ TH

Date: 2/19/91 Signature: Refuse to sign
(Resident)

Findings and Disposition of Corrective Action:

On 03/01/91 the Adjustment Committee, composed of Chairman Tera Harper and members Jeff Tom and Lt. Alan Anduha, found inmate Terry Smith guilty of violating 17-201-8(10) and 17-201-8(31). Inmate Smith pled not guilty to both charges and was self represented. He is to be placed on disciplinary segregation status and housed in the HCF Special Holding Unit. He is to receive 14 days. TIME SERVED.

Evidence relied upon for decision:

The Adjustment Committee based their decision on written reports and testimonies presented at the hearing.

[doc 0066Y]

/s/ Tera Harper	3/6/91
Committee Chairman	Date

Receipt of findings and disposition: /s/ TH

Refuse to Sign	3/7/91
Inmate	Date

Pink – Inmate

Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

No. 94-43

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1994

TERA HARPER, JEFFREY TOM, and ALLAN ANDUHA, in their capacities as Chairperson and Members of the Adjustment Committee, Halawa Correctional Facility, Hawaii Department of Public Safety

Petitioners,

vs.

SABIL M. MUJAHID, a.k.a. Terry Smith,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Paul L. Hoffman
Counsel of Record
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Santa Monica, CA 90401
(310) 260-9585

Attorneys for Respondent

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QUESTION PRESENTED

1. Whether Hawaii's prison regulations created in Respondent a "liberty interest" in being free from disciplinary segregation and whether these rights were implicated in the prison disciplinary proceedings over which petitioners presided?

2. Whether the Ninth Circuit was correct in remanding this case for further consideration of Respondent's equitable claims arising out of the failure of the prison adjustment committee to give him an adequate statement of reasons for the imposition of disciplinary segregation against him?

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Rule 17-201-8(a)(31) 2

No. 94-43

IN THE

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October Term, 1994

TERA HARPER, JEFFREY TOM, and ALLAN ANDUHA, in their capacities as Chairperson and Members of the Adjustment Committee, Halawa Correctional Facility, Hawaii Department of Public Safety

Petitioners,

vs.

SABIL M. MUJAHID, a.k.a. Terry Smith,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Sabil M. Mujahid, submits this brief in opposition to the Petition for Writ of Certiorari filed by Tera Harper, Jeffrey Tom, and Allan Anduha, in their capacities as Chairperson and Members of the Adjustment Committee, Halawa Correctional Facility Hawaii Department of Public Safety. This Opposition is related to Sandin v. Conner, No. 93-1911 (Pet. for Cert. filed May 26, 1994).

STATEMENT

Respondent Sabil M. Mujahid, aka Terry Smith, was until early August 1994, an inmate housed at the Halawa High Security Facility in Aeia, Hawaii. At the end of 1990, Respondent decided to officially change his name from Smith to Mujahid. In an attempt to assist Respondent, his brother Frank mailed a letter to the Lieutenant Governor which contained forms and stamps which were then forwarded to Respondent. Respondent determined that he did not need the stamps and attempted to return them to his brother. On December 28, 1990, Respondent attempted to send a letter containing the unused postage stamps to his brother in Kansas City. The outside of the letter stated in prominent language, "5 stamps enclosed." [Pet. 7.]

Prison officials at the Halawa Correctional Facility intercepted the letter and charged Respondent with violating two prison rules. The first of these rules prohibits "[p]ossession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate...through regular institutional channels." State of Hawaii, Dep't of Social Servs. and Housing, Title 17, Admin. R. of the Corrections Div., Rule 17-201-8(a)(10). The second prohibits "[g]iving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or wards family, or friend." State of Hawaii, Dep't of Social Servs. and Housing, Title 17, Admin. R. of the Corrections Div., Rule 17-201-8(a)(31).

On March 1, 1991, an adjustment hearing was held under Hawaii prison regulations. Petitioners Tera Harper, Jeffrey Tom and Alan Anduha were members of the Adjustment Committee. At the hearing Respondent appeared on his own behalf and presented a defense to the charges. Petitioners nevertheless found Respondent guilty of both charges and ordered him to spend fourteen days in disciplinary segregation. The adjustment committee later issued a report. Even though the administrative rules require the Committee to "set forth evidence relied upon and the reasons for the actions taken," the Committee simply stated that it had based its decision "on written reports and testimonies presented at the hearing." [Pet.App. A4]

Respondent brought a pro se action under 42 U.S.C. § 1983 claiming that the adjustment committee violated his due process rights and seeking compensatory and punitive damages and equitable relief. The District Court granted summary judgment on all of Respondent's claims.

The Ninth Circuit, in an unpublished opinion, decided that the Hawaii regulations contained the kind of mandatory language that was sufficient to create a liberty interest in freedom from administrative segregation except where substantial evidence of guilt of specific offenses was found by the adjustment committee. The Ninth Circuit also emphasized that Hawaii regulations mandate a statement of reasons for a decision to impose administrative segregation. [Pet. A6] The Ninth Circuit found that the Committee's deficient statement of reasons violated Respondent's due process rights.

The Ninth Circuit affirmed the District Court's summary judgment on Respondent's damage claims on qualified immunity grounds. [Pet. A8-9] The Ninth Circuit remanded the case to the District Court for consideration of Respondent's remaining equitable claims.

Since the filing of the Petition in July 1994 Respondent has been released on parole. The significance of Respondent's release on parole for his remaining equitable claims has not been considered by the Ninth Circuit or the District Court making this case an especially inappropriate venue to determine any of the issues akwardly raised in the Petition.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT WARRANT REVIEW BECAUSE THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN FINDING THAT HAWAII'S PRISON REGULATIONS CREATE A LIBERTY INTEREST IN REMAINING FREE FROM DISCIPLINARY SEGREGATION.

This Court has consistently held that a "state law may create enforceable liberty interests in the prison setting."[1] In Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989). Whether state law creates such a liberty interest enforceable under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C.

---

[1] This Court has held in a variety of settings that prison regulations granted inmates a protected liberty interest in parole, Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), in good-time credits, Wolff v. McDonnell, 418 U.S. 539, 556-572 (1974).

section 1983 must be determined by examining "closely the language of the relevant statutes and regulations" Id. The Ninth Circuit's opinion followed this approach in determining that the Hawaii prison regulations at issue in this case created a liberty interest in being free from disciplinary segregation unless a certain showing of misconduct was shown by "substantial evidence."

In Hewitt v. Helms 459 U.S. 460, 472 (1983) this Court held that a prisoner who was subject to administrative segregation had a protected liberty interest created under Pennsylvania law. In Hewitt this Court found that the Pennsylvania procedures at issue in that case created a liberty interest in being free from administrative segregation because the state provision "used language of an unmistakably mandatory character, requiring that certain procedures "shall", "will" or "must" be employed...and that administrative segregation will not occur absent specified substantive predicates--viz., 'the need for control' or the threat of a serious disturbance." Id.

This case is similar in that Hawaii's prison regulations are sufficiently mandatory to create a protected liberty interest in a prisoner. The Hawaii regulations require a finding of guilt of special offenses by "substantial evidence" before disciplinary segregation may be imposed. [Pet.App A7] No disciplinary segregation may be imposed without meeting these "substantive predicates."

In particular, the adjustment must find a prisoner guilty of specific offenses before imposing disciplinary segregation. These

state regulations thus fall squarely within Hewitt v. Helms and there is no reason to revisit this issue by granting the Petition.

Petitioner's primary contention is that this Court's decision in Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989) somehow forecloses the finding of a protected liberty interest in these circumstance. However, this Court derived its test in Kentucky Department of Corrections from its holding in Hewitt and expressly reaffirmed Hewitt. The Court stated first that a statute must contain "substantive predicates" or "particularized standards to govern official decision making. Next, the Court stated that the regulation must require in "explicitly mandatory language" that if the substantive predicates are met a particular outcome must follow. Id. at 461-462.

In Kentucky Department of Corrections, this Court found that the regulation restricting prisoner visitor privileges at issue in that case "lack[ed] the requisite relevant mandatory language since visitors "may", but need not, be excluded whether they fall within one of the categories of excludable visitors." Id. at 454. Thus, this Court found that the state regulations were not the kind that created expectations of enforcement sufficient to create a liberty interest in a certain form of visitation.

Petitioner contends that Hawaiian prison regulations at issue in this case are more like the regulations in Kentucky Department of Corrections than the regulations in Hewitt. In particular, Petitioner argues that these regulations are not sufficiently mandatory because they stop short of requiring that a particular

result be reached upon a finding that the "substantive predicates" are met because prisoners may not be assigned to segregation even after a finding of guilt.

However, the Ninth Circuit was correct in finding that Hawaii law creates a liberty interest in being free from the imposition of administrative segregation unless the prisoner admits his guilt of specific misconduct defined substantially in state regulations [Pet.App A35-41] or has been found guilty based on "substantive evidence." There is nothing discretionary about these requirements. Administrative segregation may not be imposed unless these substantive predicates are met. Thus, this case falls squarely within Hewitt v. Helms and is not the kind of discretionary visitation regulation at issue in Kentucky Department of Corrections.

II.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner's argue that the Ninth Circuit's holding conflicts with the holdings of other Circuits in similar cases. In particular, Petitioner claims that Burgin v. Nix, 899 F.2d 733 (8th Cir. 1990) and Woods v. Thieret, 903 F.2d 1080 (7th Cir. 1990), are in conflict with the Ninth Circuit's holding in this case.

In Burgin the issue was whether a prisoner had a liberty interest in eating a "non-sacked" meal as opposed to a nutritionally similar and adequate "sacked" meal. Burgin, 899 F.2d

at 734. The Burgin Court never reached the analysis required in Hewitt and Kentucky Department of Corrections but found that there was essentially no difference between "sacked" and "non-sacked" meals that triggered any kind of due process analysis. Id. at 734-735. Indeed, the Burgin court emphasized that there were no Iowa statutes or regulations guaranteeing that prisoners would receive a specific type of meal. Id. at 735. Under Iowa regulations prisoners who were placed on incorrigible inmate status may be served "sacked" meals "in some cases" and thus the regulations, unlike the regulations at issue in this case, did not have the explicitly mandatory language required under this Court's cases to establish a liberty interest in freedom from "sacked" lunches based on particular mandatory substantive prerequisites. Id.

Nor is the Seventh Circuit's holding in Woods v. Thieret 903 F.2d 1080 (7th Cir. 1990) in conflict with the decision below. In Woods, a prison inmate challenged three separate "lockdowns" in his cell. The regulations at issue in Woods provided for a disciplinary hearing and possible temporary confinement status based on three criteria. The Seventh Circuit found that these regulations were not sufficiently mandatory under the principles in Kentucky Board of Corrections and Hewitt to create a "liberty interest" of the kind asserted by the prisoner in that case. Id. at 1083. The regulations at issue were completely different from the regulations at issue in this case. In Woods, the Seventh Circuit held that "while the rules mandate who shall make the determinations and what shall be considered (the three substantive

predicates), they do not mandate any particular outcome." Id. Thus, the Illinois regulations considered in Woods did not create any mandatory substantive standards to be found before temporary confinement could be ordered by prison officials. The key difference in this case is that the Hawaii regulations at issue create clear, mandatory substantive predicates before prison officials may impose administrative segregation.

There is no conflict between the Ninth Circuit's holding in this case and the holdings in Burgin or Woods. In each case the court applied this Court's analysis in Hewitt and Kentucky Department of Corrections and came to different conclusions because of the different statutory schemes involved.

III.

THE NINTH CIRCUIT DECISION CORRECTLY FOUND THAT DUE PROCESS REQUIRES A MORE COMPLETE STATEMENT OF DECISION THAN WAS AFFORDED TO RESPONDENT IN THIS CASE AND IS NOT IN CONFLICT WITH THE DECISIONS IN OTHER CASES

The Ninth Circuit decided that the reasons given to Respondent for the imposition of disciplinary segregation were wholly inadequate based on this Court's decision in Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff this Court insisted that due process requires, at a minimum, "a written statement of . . . the evidence relied upon and the reasons for the disciplinary action taken." Wolff, 418 U.S. at 563. See also Redding v. Fairman, 717 F.2d 1105, 1115 N.4 (7th Cir. 1983), cert. denied, 465 U.S. 1025 (1984); King v. Wells, 760 F.2d 89, 93 (6th Cir. 1983).

Petitioners claim that the Ninth Circuit's decision creates "detailed factfinding requirements" [Pet. 17] on prison disciplinary committees and is in conflict with the Eighth Circuit's decision in Brown v. Frey, 807 F.2d 1407 (8th Cir. 1986). [Pet. 19]

First, the Ninth Circuit has not created any new requirement of detailed fact finding. In this case Petitioners gave no indication of the reasons for their decision at all. A statement of decision that says that Petitioners relied on the testimony and evidence presented amounts to no statement of reasons. The Ninth Circuit broke no new ground in deciding that Petitioner's statement violated due process.

Second, the decision in Brown v. Frey, supra, is not in conflict with the Ninth Circuit's holding in this case. In Brown the court required the prison committee to commit itself to certain evidence and specified reasons for the disciplinary decision at the time the decision is made. 807 F.2d at 1414. The Brown Court would have found Petitioners' statement wholly inadequate under these principles. Thus, there is no conflict between the Circuits for this Court to resolve. This is certainly so in the context of the wholly deficient statement issued by Petitioners in this case.

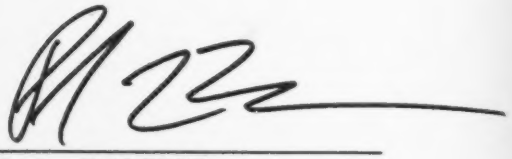
CONCLUSION

For all of these reasons the Petition should be denied. In particular, Respondent's release on parole after the filing of the Petition makes this case an inappropriate case for review by this

Court. The significance of Respondent's release should be determined by the District Court on remand in the first instance.

DATED: September 6, 1994

Respectfully submitted,



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